No. 89

FILED
AUG 10 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORRELL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOOD GIRLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervener Defendant-Appellee.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE LONG ISLAND CONFERENCE OF RELIGIOUS ELEMENTARY AND SECONDARY SCHOOL ADMINISTRATORS (LICRESSA), AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND INTERVENER DEFENDANT-APPELLEE

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Interest of the Amicus Curiae

The Long Island Conference of Religious Elementary and Secondary School Administrators (LICRESSA), the amicus curiae submitting this brief, are the chief administrators of voluntary, non-profit, full time, accredited, religious elementary and secondary schools in Long Island, New York, offering State approved curricula. The Conference is composed of the Lutheran High School Association, the Hebrew Day Schools, the Episcopal Schools, Diocese of Long Island, and the Education Department of the Roman Catholic Diocese of Rockville Centre. It is believed to be the first organization of its type in the nation. Its accredited religious elementary and secondary schools have a combined enrollment in excess of 100,000 children, who attend these schools under New York's compulsory education law.

The prime purpose of the Conference is that its members may meet, plan and work cooperatively with each other and with public educators in the common interest of furthering excellence in education for all children. The Conference has pioneered in advancing interfaith understanding and is living proof that religiously affiliated education is not a divisive force in our society but can be a major force in producing inter-religious harmony.

Religiously oriented schools pursue two distinct goals, religious instruction and secular education. The processes of religious and secular training in these schools are not so intertwined that clearly secular subjects become instrumental in the teaching of religion. The plain fact is that most subjects taught in religiously oriented schools are clearly *not* religious. To maintain accreditation in the field of education our schools must adopt state approved curricula and must meet state educational standards. As

educators we know we are achieving the same educational objectives as public school educators. New York school children—in both public and non-public schools—take common examinations such as the State Pupil Evaluation Programs Tests and the State Regents' Examinations. There are no religious questions asked on these examinations. They test secular knowledge only. Yet, based on the published results of these state examinations, our children perform equally as well as the children in public schools. We believe that this is a reflection of the quality of the teaching we are providing in secular subjects.

The Conference believes, along with a growing number of legislators, that reasonable measures designed to aid the secular educational objectives of non-public schools is in the public interest and is constitutionally sound. The matter is one of degree. Our schools comply with all the requirements of the State compulsory education law. When we add religious instruction to the school curriculum, we do not thereby constitutionally taint our whole educational fabric. We simply provide a supplement we believe is an integral part of the education of the whole child.

In support of its beliefs the Conference participated as amicus curiae before this Court in the New York Textbook Loan Law case. *Board of Education* v. *Allen*, 392 U. S. 236 (June 10, 1968). The textbook loan program approved by this Court has proved to be a valuable aid in relieving some of New York's problems. Administratively it has functioned well and smoothly and has not given rise to divisive influences and inhibitions of freedom. In its last session the New York Legislature took another forward step to relieve additional educational problems by enacting a Mandated Services Act under which New York reimburses its non-public schools for expenses incurred for certain mandated educational services such as the keeping of attendance records.[1]

[1] Education Law 207, Chapter 138 of the Laws of 1970.

The Conference is particularly interested in the instant case because this Court's decision in the present appeal will have far reaching impact on New York Law and on other educational programs throughout the Nation designed to permit assistance to the secular educational objectives of non-public schools as the general welfare requires.

We firmly believe that the Pennsylvania Non-public Elementary and Secondary Education Act does not constitute an establishment of religion but is a proper exercise of State concern to further and assist the secular goals of non-public education.

For these reasons we have obtained the consent of counsel for all parties in this case to file a brief amicus curiae herein in support of the constitutionality of the Pennsylvania Act and pursuant to such consent we have directed counsel to prepare and file this brief.

Summary of Argument

Appellants believe that state and church are so entangled in the administration of the Statute, and that the secular and religious are so intertwined in church related education that even the purely secular activities of church oriented schools cannot constitutionally receive state aid. We hold that the principles laid down by this Court in *Board of Education* v. *Allen, supra,* are applicable here and that nothing that was said in *Walz* v. *Tax Commission of the City of New York*—, U. S.—, 25 L. ed., 2d, 697 (1970) lessens the vitality of those principles in sustaining the Pennsylvania Statute.

The Statute does not employ religion as its standard for action or inaction. Its express purpose, as stated by the Legislature, is to support the purely secular objectives of non-public schools to meet the educational crisis existent in

the state as a result of the rapid increases in school costs and school population. Appellants can show nothing about the necessary effects of the Statute that is contrary to its stated purpose. Since the Statute specifically defines the secular services involved, it avoids entanglements between church and state that might arise should state officials be required to judge the lines of separation between sectarian and secular. Absent evidence in the record herein, it cannot be assumed that school officials will not honestly discharge their duties under the law.

The Statute is entitled to the presumption of constitutionality with which all such legislation is favored. It should not be invalidated on constitutional grounds unless its infirmities are unmistakable and not, as here, hidden in hypotheses and assumptions based upon extreme theories of separationism.

ARGUMENT

POINT I

Pennsylvania's Non-public Elementary and Secondary Education Act is constitutional under this Court's interpretation of the First and Fourteenth Amendments.

The case at bar involves the expenditure of State funds under Pennsylvania's Non-public Elementary and Secondary Education Act[2] (hereinafter the Statute) for the purchase of certain specific secular educational services from non-public schools accredited under the State's compulsory school attendance law. It involves findings and a declaration of policy by the Pennsylvania Legislature that a crisis exists in elementary and secondary education in Pennsyl-

[2] 24 P.S. No. 4601 *et seq.* (Supp. 1969).

vania and that non-public education, by providing instruction in secular subjects, contributes to the public welfare of the State. It was also found that twenty percent of all elementary and secondary school children in Pennsylvania fulfill the requirements of the Commonwealth's Compulsory School Attendance Laws in non-public schools, and that the State might fulfill a governmental duty by supporting the purely secular objectives of non-public education.

The principles laid down by this Court in *Board of Education* v. *Allen, supra,* and illumined further in *Walz* v. *Tax Commission of the City of New York, supra* are controlling here. Pennsylvania has chosen to recognize that its religious schools pursue two distinct goals, religious instruction and secular education. The First Amendment, made applicable by the Fourteenth, bans state assistance to the first but not to the second, lest official hostility to religion result. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Mr. Justice White recognized the difficulties in precisely defining that position in a specific case when he wrote in Allen:

> "Everson and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem like many problems in constitutional law, is one of degree.' Zorach v. Clauson, 343 U. S. 306, 314 (1952). See McGowan v. Maryland, 336 U. S. 420 (1961). Based on Everson, Zorach, McGowan and other cases, Abington School District v. Schempp, 374 U. S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion". *Board of Education* v. *Allen, supra* at 242, 243.

We believe that the statute on its face and in its express aim as stated by the legislature clearly meets the first requirement of the test for constitutionality fashioned in *Schempp* and endorsed in *Allen* "that there must be a secular legislative purpose".

We further believe that the statute has "a primary effect that neither advances nor inhibits religion". It is to this second part of the test that we shall address the remainder of our brief.

The Court's use of the adjective "primary" is not without significance. It focuses concern on the single most important effect of the statute. "A primary effect" cannot mean "multiple primary effects". Such a construction would render the word "primary" meaningless.

The "primary effect" of the statute might best be gauged by what it does and does not do.

The statute DOES:

> • Provide for payments from public funds to nonpublic schools, including religiously oriented schools, for the actual cost of certain teachers' salaries, textbooks and instructional materials required to provide secular educational services in courses limited to mathematics, modern foreign languages, physical science and physical education, after such services have been rendered.

• Require the approval of the State Superintendent of Public Instruction of all textbooks and instructional materials employed in the instruction.

• Require the achievement of a satisfactory level of student performance in standardized tests.

• Require ultimate State certification of teachers.

• Provide for the establishment of a non-public elementary and secondary education fund with monies taken exclusively from the proceeds of State horse racing and harness racing as the sole source of funding.

The statute DOES NOT:

• Employ religion as its standard for action or inaction.

• Coerce anyone or in any way restrain the free exercise of religion.

• Sponsor, fund or favor any religious activities of the schools involved.

• Entangle government in difficult classifications of what is or is not religious, or involve the State significantly or directly in the realm of the sectarian so as to give rise to divisive influence and inhibitions of freedom.

• Employ the organs of government for any religious purpose.

• Use essentially religious means to serve governmental ends where secular means would suffice.

• Effect favoritism among sects or between religion and non-religion.

• Work deterrence of any religious belief.

• Produce those official involvements of religion which would tend to foster or discourage religious worship or belief.

Not one of the positive or negative effects of the Statute set forth would seem to "advance" or "inhibit" religion.

The practices struck down in *Schempp, supra, Engel* v. *Vitale,* 370 U. S. 421 (1962), and *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203 (1948)—all of them involving distinctively religious exercises in the public schools—are examples of activities which this Court intended to be encompassed by the concept "primary effect advancing religion". On the other hand, Everson, McGowan and Allen upheld the constitutionality of bus transportation, Sunday closing laws and the furnishing of textbooks in recognition that these acts did not have "a primary effect of advancing religion" and that to hold otherwise would give them "a primary effect of inhibiting religion", a result which would violate religious freedom.

The principles emphasized by Mr. Justice Harlan in his concurring opinion in Allen are applicable:

> "The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality. Neutrality is, however, a coat of many colors. It requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." Abington School Dist. v. Schempp, 374 U. S. 203, 305 (concurring opinion of Goldberg, J.). Realization of these objectives entails "no simple and clear measure," id., at 306, by which this or any case may readily be decided; but these objectives do suggest the principles which I believe to be applicable in the present circumstances. I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly

> in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom," id., at 307, it is not forbidden by the religious clauses of the First Amendment.
>
> In my opinion, §701 of the Education Law of New York does not employ religion as its standard for action or inaction, and is not otherwise inconsistent with these principles." Board of Education v. Allen, supra, at 249, 250.

The Statute under review is completely neutral with respect to religion. It merely recognizes the role in secular education played by non-public schools and offers assistance in educational courses carefully limited under the Act to mathematics, modern foreign languages, physical science and physical education. On its face there is nothing about the necessary effects of the statute that is contrary to its stated purpose. In this legislation the State has properly chosen to satisfy its interest in secular education through the instrument of non-public schools. The only alternative means by which this general public need could be served would be to stand by helplessly and permit the deterioration of non-public schools to the point where their children would be moved en bloc into public schools—an alternative that would be as catastrophic to the public schools and to the solvency of the State as it would be debilitating to the principle of parental freedom of educational choice.

From the above it is clear that the principles laid down in Allen support Appellees' position unless those principles have been modified or overruled by the decision of this Court in *Walz* v. *Tax Commission of the City of New York, supra,* (May 4, 1970). In that case the New York City Tax Commission's grant of an exemption to church property was challenged as requiring a contribution to religious bodies and therefore was an establishment of religion. In upholding the exemption, Chief Justice Burger pointed

out that the course of constitutional neutrality in the area of First Amendment freedoms—

> "* * * cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, *which is to insure that no religion be sponsored or favored, none commended, and none inhibited.** The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally estabished religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and pratices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." Walz, supra at 701, 702.

The Chief Justice recognized the validity of the test applied in Allen in these words:

> "Similarly, making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment." Id. at p. 703.

*Emphasis added.

He then went on further to say:

> "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring or supporting religion, does not end the inquiry. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. * * * the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case." Id. at p. 704.

Nor, might it be added, is that the case at bar. State involvement in administering the statute is minimal. The controls imposed are only those reasonably necessary to assure quality, to limit cost and to secure solely secular educational objectives that are clearly defined and not left to administrative discretion. Given the public emergency faced by its educational resources Pennsylvania would have appeared to have successfully traversed the "tight rope" constitutional course necessary in creating administrative relationships between its public education officials and church oriented schools that preserves the autonomy and freedom of the schools while avoiding any semblance of established religion. The statute is a proper accommodation under that benevolent neutrality which must be the hallmark of interpretation of First Amendment freedoms, lest hostility to religion dominate.

On June 15, 1970 a three Judge Court struck down Rhode Island's Salary Supplement Act[3] which provided for the

3. Rhode Island Public Laws C. 245, 1969.

payment of state funds to teachers of secular subjects in non-public elementary schools, *DiCenso* v. *Robinson*, —F. Supp.—(D.C.R.I. 1970). In so far as that decision rests on the theory that the teaching of secular subjects in a religiously oriented school becomes a religious enterprise, it is contrary to *Allen* and evidences an hostility to religion that is constitutionally forbidden. The decision rested on the further ground that the Act involved the state in that form of excessive entanglement forbidden by the Court's understanding of the majority opinion of this Court in *Walz*. The *Schempp-Allen* test was the refined product of eight of the Justices of this Court in *Schempp* and was affirmed by the majority of this Court in *Allen*. It affords a viable and realistic accommodation to the educational and religious needs of our people in the area of First Amendment freedoms. *Walz* did not overrule *Allen so* as to render direct subsidies for clearly secular services to religiously oriented schools *ipso facto* unconstitutional. The administrative involvement in these programs is minimal rather than excessive. Its emphasis is on the quality, cost and production of secular objectives only and there is no intrusion into the sectarian goals of the schools. Programs actually involving "excessive entanglement" will be given short shift "while this Court sits." We do not find it in the modest programs undertaken in Pennsylvania and in Rhode Island. The holding in *DiCenso* is an unwarranted step backward from *Allen* that would cut the "tight rope" bridging the constitutional borders between Church and State, abort the legitimate progeny conceived along its narrow line and leave no "play in the joints" necessary for the operation of that benevolent neutrality by which government can accommodate the spiritual and secular needs of its citizens in the area of religious freedom. Indeed, it would inject that very rigidity into constitutional interpretation which

the Chief Justice feared could defeat the basic purpose of the First Amendment itself. *Walz, supra,* at 701.

The case foreseen by Mr. Justice Harlan in his concurring opinion in *Walz, supra,* is now before this Court. His words have special relevance here:

> "Whether subsidies or direct aid entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a later case upon a record that fully develops all the pertinent considerations such as the significance and character of subsidies in our political system and the role of the government in administering the subsidy in relation to the particular program aided. *It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government.* (emphasis added) Cf. e.g., my separate opinion in Roth *v.* United States, 354 U. S. 476, 496 (1957).
>
> I recognize that for those who seek inflexible solutions this tripartite analysis provides little comfort. It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without a constitutional toehold. Like the Chief Justice I am of the view that it is the task of this tribunal to 'draw distinctions, including fine ones, in the process of interpreting the Constitution.' The prospect of difficult questions of judgment in constitutional law should not be the basis for prohibiting legislative action that is constitutionally permissible." Walz, supra at 719.

Conclusion

The judgment of the District Court of Three Judges for the Eastern District of Pennsylvania should be affirmed.

Respectfully submitted,

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